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10 Attorneys for defendants MICHAELINE HEYDARI and DUCK DIVE
11 GASTROPUB, INC.

12 UNITED STATE DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA
14

15 DUCK DIVE, A California Limited
16 Partnership,

17 Plaintiff,

18 vs.
19

20 MICHAELINE HEYDARI, individually
and doing business as THE DUCK DIVE
21 and DUCK DIVE GASTROPUB, INC.,
22 a California Corporation, doing business
as DUCK DIVE GASTROPUB or
23 DUCK DIVE GASTROPUB MALIBU;
24 and DOES 1 through 50, inclusive,

25 Defendants.
26
27
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Case No.: '13CV1477 BTM BLM
**DEFENDANTS' ANSWER TO
COMPLAINT**

1 Defendants Michaeline Heydari and Duck Dive Gastropub, Inc., for themselves
2 alone, hereby answer the Complaint as follows:

3 1. Answering Paragraph 1, defendants lack knowledge or information
4 sufficient to form a belief about the truth of the allegation.

5 2. Answering Paragraph 2, defendants lack knowledge or information
6 sufficient to form a belief about the truth of the allegation.

7 3. Answering Paragraph 3, defendants deny the allegations.

8 4. Answering Paragraph 4, defendants deny the allegations.

9 5. Answering Paragraph 5, defendants lack knowledge or information
10 sufficient to form a belief about the truth of the allegation.

11 6. Answering Paragraph 6, defendants deny the allegations.

12 7. Answering Paragraph 7, defendants lack knowledge or information
13 sufficient to form a belief about the truth of the allegation.

14 8. Answering Paragraph 15, defendants lack knowledge or information
15 sufficient to form a belief about the truth of the allegation.

16 9. Answering Paragraph 16, defendants lack knowledge or information
17 sufficient to form a belief about the truth of the allegation.

18 10. Answering Paragraph 17, defendants lack knowledge or information
19 sufficient to form a belief about the truth of the allegation.

20 11. Answering Paragraph 18, defendants lack knowledge or information
21 sufficient to form a belief about the truth of the allegation.

22 12. Answering Paragraph 19, defendants lack knowledge or information
23 sufficient to form a belief about the truth of the allegation.

24 13. Answering Paragraph 20, defendants lack knowledge or information
25 sufficient to form a belief about the truth of the allegation.

1 14. Answering Paragraph 21, defendants admit that Duck Dive
2 Gastropub, Inc. was formed as a California corporation in January 2013.
3 Defendants deny the remainder of the allegations.

4 15. Answering Paragraph 22, defendants admit that the corporation owns,
5 operates, supervises and manages the restaurant, and that it became operational on
6 or about May 11, 2013. Defendants deny the remainder of the allegations.

7 16. Answering Paragraph 23, defendants admit that the application was
8 submitted, admit that plaintiff has filed an opposition, and as for the remainder of
9 the allegations, defendants lack knowledge or information sufficient to form a
10 belief about the truth of the allegation.

11 17. Answering Paragraph 24, defendants deny the allegations.

12 18. Answering Paragraph 25, defendants deny the allegations.

13 19. Answering Paragraph 26, defendants deny that they were aware of the
14 alleged news article and deny any allegation that they are leeching off of any
15 goodwill of plaintiff. As for the remainder of the allegations, defendants lack
16 knowledge or information sufficient to form a belief about the truth of the
17 allegation.

18 20. Answering Paragraph 27, defendants deny that the marks are
19 substantially similar or confusingly similar, and lack knowledge or information
20 sufficient to form a belief about the truth of the remainder of the allegations.

21 21. Answering Paragraph 28, defendants deny the allegations.

22 22. Answering Paragraph 29, defendants incorporate by reference their
23 responses to the subject paragraphs.

24 23. Answering Paragraph 30, defendants deny the allegations.

25 24. Answering Paragraph 31, defendants deny the allegations.

26 25. Answering Paragraph 32, defendants deny the allegations.

27 26. Answering Paragraph 33, defendants deny the allegations.

1 27. Answering Paragraph 34, defendants deny the allegations.

2 28. Answering Paragraph 35, defendants incorporate by reference their
3 responses to the subject paragraphs.

4 29. Answering Paragraph 36, defendants lack knowledge or information
5 sufficient to form a belief about the truth of the allegation.

6 30. Answering Paragraph 37, defendants lack knowledge or information
7 sufficient to form a belief about the truth of the allegation.

8 31. Answering Paragraph 38, defendants deny the allegations.

9 32. Answering Paragraph 39, defendants deny the allegations.

10 33. Answering Paragraph 40, defendants incorporate by reference their
11 responses to the subject paragraphs.

12 34. Answering Paragraph 41, defendants deny the allegations.

13 35. Answering Paragraph 42, defendants deny the allegations.

14 36. Answering Paragraph 43, defendants deny the allegations.

15 37. Answering Paragraph 44, defendants deny the allegations.

16 38. Answering Paragraph 45, defendants deny the allegations.

17 39. Answering Paragraph 46, defendants incorporate by reference their
18 responses to the subject paragraphs.

19 40. Answering Paragraph 47, defendants lack knowledge or information
20 sufficient to form a belief about the truth of the allegation.

21 41. Answering Paragraph 48, defendants deny the allegations.

22 42. Answering Paragraph 49, defendants deny the allegations.

23 43. Answering Paragraph 50, defendants deny the allegations.

24 44. Answering Paragraph 51, defendants deny the allegations.

25 45. Answering Paragraph 52, defendants deny the allegations.

26 46. Answering Paragraph 53, defendants deny the allegations.

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1 47. Answering Paragraph 54, defendants incorporate by reference their
2 responses to the subject paragraphs.

3 48. Answering Paragraph 55, defendants deny the allegations.

4 49. Answering Paragraph 56, defendants deny the allegations.

5 **AFFIRMATIVE DEFENSES**

6 **FIRST AFFIRMATIVE DEFENSE**

7 (Failure to State a Claim)

8 50. The Complaint, and each purported claim for relief alleged therein,
9 fails to allege facts sufficient facts to constitute claims upon which relief can be
10 granted.

11 **SECOND AFFIRMATIVE DEFENSE**

12 (Abandonment, 15 USC § 1115(b)(2))

13 51. Defendants allege that plaintiff, and its assignors, predecessors-in-
14 interest, and their licensees, abandoned its trademark.

15 **THIRD AFFIRMATIVE DEFENSE**

16 (Prior Use, 15 USC 1115(b)(5))

17 52. Defendants used the descriptive term “Duck Dive” on packaging to
18 describe its goods to its users prior to plaintiff’s use of the mark and without
19 knowledge of plaintiffs’ prior registration and plaintiffs’ use thereof.

20 **FOURTH AFFIRMATIVE DEFENSE**

21 (Use of Plaintiff’s Mark Violates Federal Antitrust Laws, 15 USC § 1115(b)(7))

22 53. Defendants allege that plaintiff has used its trademark to violate the
23 antitrust laws of the United States.

1 FIFTH AFFIRMATIVE DEFENSE

2 (Estoppel)

3 54. Defendants allege that plaintiff and its predecessors-in-interest
4 delayed in enforcing their rights, if any, and plaintiff has only dubious title to the
5 mark.

6 SIXTH AFFIRMATIVE DEFENSE

7 (Estoppel)

8 55. Defendants allege that plaintiff and its predecessors-in-interest
9 delayed in enforcing their rights, if any, such that there is dubious likelihood of
10 confusion between the marks as used.

11 SEVENTH AFFIRMATIVE DEFENSE

12 (Unclean Hands, Estoppel)

13 56. Defendants allege that plaintiff and its predecessors-in-interest
14 delayed in enforcing their rights, if any, against these defendants and/or many
15 other users of the mark, including those registering the mark as part of another
16 mark, misleading the public as to the existence of any trademark rights.

17 EIGHTH AFFIRMATIVE DEFENSE

18 (Any Damage is the Result of Acts of Others)

19 57. While defendants deny that plaintiff has been damaged in any way, if
20 it should be determined that plaintiff has been damaged, then defendants allege that
21 such damage was not caused by defendants, but resulted from the conduct of
22 plaintiff or others who were either not employed by defendants or acted outside the
23 course and scope of employment, without the consent or ratification of defendants.

24 NINTH AFFIRMATIVE DEFENSE

25 (Lack of Venue)

26 58. Venue in any forum other than Los Angeles, California is improper
27 and inconvenient.
28

1 TENTH AFFIRMATIVE DEFENSE

2 (Fraud)

3 59. Defendants are informed and believe and thereupon allege that the
4 registration is false and was fraudulently obtained in that no product bearing the
5 mark was in commerce as asserted.

6 ELEVENTH AFFIRMATIVE DEFENSE

7 (Fraud)

8 60. Defendants are informed and believe and thereupon allege that the
9 registration is false and was fraudulently obtained in that neither plaintiff nor its
10 predecessor-in-interest disclosed the use in commerce of the mark by others.

11 TWELFTH AFFIRMATIVE DEFENSE

12 (Fraud, Sherman Act §2)

13 61. Defendants are informed and believe and thereupon allege that the
14 registration is false and was fraudulently obtained and is an attempt to monopolize
15 the relevant market in violation of 15 USC §2.

16 THIRTEENTH AFFIRMATIVE DEFENSE

17 (Free Speech)

18 62. Defendants allege that plaintiff is attempting to prohibit its rights
19 protected by the United States Constitution to free speech.

20 FOURTEENTH AFFIRMATIVE DEFENSE

21 (Cancellation)

22 63. Defendants are informed and believe and thereupon allege that the
23 registration should be canceled in that the mark has become abandoned pursuant to
24 15 USC § 1064(3).

1 FIFTEENTH AFFIRMATIVE DEFENSE

2 (Cancellation)

3 64. Defendants are informed and believe and thereupon allege that the
4 registration should be canceled in that the mark was obtained fraudulently pursuant
5 to 15 USC § 1064(3).

6 SIXTEENTH AFFIRMATIVE DEFENSE

7 (Misrepresentation)

8 65. Defendants are informed and believe and thereupon allege that the
9 mark as used misrepresents the source of the goods or services in connection with
10 which the mark was used.

11 SEVENTEENTH AFFIRMATIVE DEFENSE

12 (Nominative Fair Use)

13 66. Defendants are informed and believe and thereupon allege that
14 defendants' use is a nominative fair use.

15 EIGHTEENTH AFFIRMATIVE DEFENSE

16 (Jus Tertii)

17 67. Defendants are informed and believe and thereupon allege that third
18 parties have superior rights to the mark than plaintiff.

19 NINETEENTH AFFIRMATIVE DEFENSE

20 68. Defendant alleges that it may have other separate and additional
21 defenses of which they are currently not aware, and hereby reserves the right to
22 assert them by amendment to this Answer as discovery continues.

23
24 WHEREFORE, defendants MICHAELINE HEYDARI and DUCK DIVE
25 GASTROPUB, INC. pray that judgment be entered against plaintiff as follows:

- 26 1. That plaintiffs take nothing by virtue of their Complaint;
27 2. That the Complaint be dismissed with prejudice;
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1 3. For costs of suit incurred herein, including reasonable attorneys' fees;
2 and;

3 4. For such other and further relief as the Court deems just and proper.
4

5 Dated: August 28, 2013

LAW OFFICES OF JOHN A. FURUTANI

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7 By: /s/ John A. Furutani

8 John A. Furutani

9 Attorneys for defendants Michaeline Heydari
10 and Duck Dive Gastropub, Inc.
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